United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

~~77-6156, 6157~~ 77-6156

IN THE UNITED STATES COURT OF

APPEALS FOR THE SECOND CIRCUIT

ORIGINAL

BROOKHAVEN CABLE TV INC.; CAPTIOL CABLEVISION INC.; SAMSON CABLEVISION CORP.; TELEPROMPTER CABLE SYSTEMS, INC.; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION, and HOME BOX OFFICE, INC.,

Appellees,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Appellees,

- against -

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman; MICHAEL H. PRENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Appellants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Intervenor-Appellant,

CITY OF NEW YORK

Amicus-Curiae.

Docket No.

77-6156

77-6157

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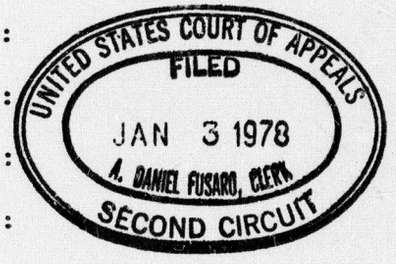

ON APPEAL FROM A
DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

REPLY BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,	:	
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Appellants,	:	
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS	:	
Intervenor-Appellant,	:	
CITY OF NEW YORK	:	
Amicus-Curiae.	:	

ON APPEAL FROM A
DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

REPLY BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners hereby submits its reply brief in the above-captioned case.

INTRODUCTION

In this case the National Association of Regulatory Utility Commissioners (NARUC) seeks reversal of the decision of the U.S. District Court for the Northern District of New York which held that the Federal Communications Commission (FCC) has jurisdiction to preempt State regulation of rates charged for pay cable television.

Briefs appealing the District Court's decision were filed on October 28, 1977 by the NARUC and by the Commissioners of the New York State Commission on Cable Television. On December 16, 1977, responding briefs were filed by the plaintiffs-appellees and by the FCC and the United States Government (hereinafter referred to as FCC).

ARGUMENT

I.
THE FCC DOES NOT HAVE JURISDICTION TO PREEMPT STATE REGULATION OF PAY CABLE RATES

As the NARUC stressed in its initial brief in this proceeding, we firmly believe that the FCC does not have the requiste jurisdiction to preempt State regulation of pay cable rates. This is not a case where an agency is granted jurisdiction through Congressional mandate. Nowhere in the Communications Act of 1934 (47 U.S.C. § 151 et seq.) was the FCC granted any authority to regulate cable television. The FCC's authority in this area is solely through judicial interpretation of the Communications Act and thus, for the FCC to validly preempt State regulation of pay cable rates, such preemption must specifically flow from these judicial decisions.

All the parties to this proceeding, as well as the District Court, recognized the overwhelming importance of United States v. Southwestern Cable Co., 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), wherein the Court stated:

> ...the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with Law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes. (Id. 392 U.S. at 178, 20 L. Ed. 2d at 1016. Emphasis Supplied.) 1/

However, all similarities among the various interests in this proceeding ends with this recognition of the importance of Southwestern Cable.

It is at this point that the plantiffs-appellees depart from fact and begin an excursion into fantasy. Their brief abounds with alleged case holdings which cannot even arguably derive from the actual decisions of the courts. One glaring example of this tactic appears in the plaintiffs-appellees' Brief at 21, where it is stated:

> The "Classification" has prompted several New York localities to seek to control the prices of pay cable programs. In two decisions, the courts have rejected such attempts.

As authority for this statement, Good-Vue CATV, Inc. v. Baron,

1/ The plaintiffs-appellees are incorrect in stating that the Southwestern case held "that the FCC's jurisdiction over cable television was 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting (392 U.S. at 178)," (Brief 25) In fact, the Southwestern case held that any authority that the FCC has to regulate CATV must be "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178).

76 CIV 4730 (CES), United States District Court, Southern District of New York, is cited.

The major error in the above-quoted statement concerns the fact that the Good-Vue case has yet to be decided. That proceeding, in which the NARUC is a party (and, in which the plaintiffs-appellees are amici), concerns the same issues involved in the case at bar--namely whether the FCC has the jurisdiction to preempt State regulation of pay cable rates. Many briefs were filed by the parties in Good-Vue seeking summary judgement, but no final decision has been issued. (The only order issued by the court, was an Order of Preliminary Injunction restraining the New York Cable Commission from precluding the cable companies from increasing pay cable rates). In fact, in a letter dated December 14, 1977, the parties in Good-Vue were informed that the presiding judge (J. Stewart) has decided to "defer action on the motions pending a decision in Brookhaven."

In addition to the questionable argument described above, the plaintiffs-appellees also misconstrue and misapply many cases that they would like to rely upon for the proposition that the FCC does have preemptive jurisdiction over pay cable rates.

In describing National Association of Theatre Owners v. FCC, 420 F. 2d 194 (D.C. Cir., 1969), cert. denied, 397 U.S. 922 (1970) [NATO], the plaintiffs-appellees state that "NATO upheld the FCC's 1968 decision that prices charged for over-the-air pay television services should be left unregulated." (Br., at 29). Even a cursory reading of the case, however, will reveal that neither the FCC nor the Court of Appeals ruled on the rate issue. The court stated, at 203:

> We approve the Commission's conclusion that it was not called upon to decide whether, or in what circumstances, its licensing regulatory functions might include surveillance or control over rates charges for services.

This statement does not mean, as the FCC contends (FCC Br., at 23), that the court "determined that the FCC had authority to regulate subscription television rates." Instead this statement, and others in the case, indicate that the FCC and the court never even reached the issue of rate regulation. The court in NATO merely ruled that the FCC had the jurisdiction to "authorize permenent nationwide STV" (420 F. 2d. at 198) and upheld FCC authority to impose specific regulations governing STV. Such rulings had nothing to do with rate regulation.

Similarly, in construing National Association of Regulatory Utility Commissioners v. FCC, 525 F. 2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) [NARUC I], plaintiffs-appellees attempt to convince this Court that the case stands for a proposition that is far from its actual holding. At 23-24 of the plaintiffs-appellees' Brief, the court in NARUC I is said to have held that "rates for land mobile services should not be regulated at the federal or state level." Again, at 32 of that Brief, it is stated that the FCC and the Court of Appeals authorized, in NARUC I, the "preemption of local rate regulation."

Upon close analysis of the court decision in NARUC I, and the FCC decision that the court affirmed (51 F.C.C. 2d 945 (March 19, 1975)], it is clear that the only area that was preempted was "possible assertion of state entry certification over SMRS." (525 F. 2d at 646 citing 51 F.C.C. 2d at 974). In NARUC I, the Court of Appeals upheld FCC refusal to classify SMRS as common carriers.

Instead, the FCC chose to authorize these new communication systems as part of the Public Safety, Industrial, and Land Transportation Radio Services, subjecting them to Federal licensing requirements. As in NATO, the FCC and the court did not even reach the issue of rate regulation, stating:

> In limiting the pre-emption to entry certification, the 1975 Order expresses the hope "that states will follow our lead towards a free, competitive environment for SMR systems..." but "defer[s] judgement to any action by the states relating to regulation of other aspects of SMR operations." Id. [Court quoting from 51 F.C.C. 2d at 974].

It is clear from the above-quoted passage that the NARUC I decision had nothing to do with preemption of state rate regulation of SMRS and therefore the case has been misapplied by the plaintiffs-appellees. The language of the court and the FCC pertaining to a free, competitive environment referred only to entry of these facilities into the market. The instant proceeding has nothing to do with entry or licensing.

Furthermore, it is the NARUC's contention that, contrary to plaintiffs-appellees' assertions, the decisions in National Association of Regulatory Utility Commissioners v. FCC, 533 F. 2d 601 (D.C. Cir., 1976) [NARUC II] and Home Box Office, Inc. v. FCC, et al., No. 75-1280, et al. (D.C. Cir., March 25, 1977), cert. denied, 46 U.S.L.W. 3216 (October 3, 1977) [HBO] are indicative of the FCC's lack of jurisdiction over pay cable rates.

As stated in our initial brief, the language from NARUC II, delineating FCC jurisdiction, is directly in point. The Court stated, at 612:

> We are not persuaded that either the statute on its face or the construction which it has been given in Southwestern and Midwest supports the Commission's argument that is has a blanket jurisdiction over all activities which cable systems may carry on. The language of § 152 (a) is quite general and is not unambiguously jurisdictional in character. (footnote omitted). There is nothing in the words themselves compelling a conclusion that any or all operations of a cable system are within the ambit of Commission power. ...The Court [in Southwestern and Midwest] thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting. (Emphasis Supplied.)

The above language is clearly contrary to plaintiff-appellees' assessment that NARUC II "recognized the broad scope of the FCC's power over cable television under Midwest Video." (Br. at 41)

Moreover, it is clear that under all the CATV cases the FCC must meet the "ancillary to broadcasting" standard. There is no rate regulation in broadcasting and therefore, there can be no FCC regulation of rates for cable television.

This point is again brought out in HBO where the Court of Appeals, at 48 of the slip opinion ruled:

> [W]e do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media... Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists.

Judge Port's decision on appeal herein was based upon the dubious conclusion that the FCC can assert jurisdiction over any aspect of CATV if the ends sought are program diversity. However, the cable television decisions do not stand for that questionable proposition. Instead, those cases hold that the FCC does have some jurisdiction over CATV but that any such authority must

be "reasonably ancillary" to the FCC's jurisdiction over television broadcasting. It is the NARUC's position that FCC preemption of pay cable rate regulation is not "ancillary" to the regulation of broadcasting. Moreover, the NARUC submits that any efforts by the FCC to preempt State regulation of pay cable rates would go beyond its authority recognized in United States v. Midwest Video Corp., 406 U.S. at 676, 32 L. Ed. 2d at 407, 92 S. Ct. 1860 (1972), which in the words of Chief Justice Burger, concurring, "strain[s] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decision of the Commission and the Courts."

II.
THE FCC CAN NOT PRECLUDE STATE REGULATION WITHOUT FIRST MEETING WELL-ESTABLISHED TESTS

Contrary to appellees' assertions, the NARUC is not asking this Court to rule that a failure to promulgate specific regulations by a Federal agency, is, in and of itself, a failure to exercise jurisdiction. The NARUC agrees that a "CFR section is [not] an indispensible prerequisite of preemption." (Plaintiffs-appellees Br. at 23). Our argument, which appellees have entirely misconstrued, is that a Federal agency can not preempt valid State regulatory authority for the sole purpose of precluding the exercise of lawful State jurisdiction unless the authority to regulate that field is specifically vested in the Federal agency by statute. It is the NARUC's contention that the FCC cannot, through the use of mere policy statements, order the States not to exercise jurisdiction, and, at the same time, fail to actually regulate the field it is preempting. The NARUC submits that the alleged FCC preemption herein is violative of established

Constitutional principles that grant the States fundamental rights to regulate certain activities affecting their citizenry.

It is important to distinguish between an excerise of jurisdiction by a Federal agency and a preemptive exercise of jurisdiction. The difference is one of degree and it is well established that the Federal government must meet certain tests prior to invading lawful State authority.

As stated in our initial brief (at 8-9), the Supreme Court has established such specific tests to determine whether Federal legislation has preempted State regulation of a particular field: (1) whether the subject matter inherently requires national uniformity; (2) "whether there is evidence of congressional intent exclusively to occupy the field"; (3) whether as a practical matter "both regulations can be enforced without impairing the federal superintendence of the field." Head v. New Mexico, 374 U.S. at 442-445, 10 L. Ed 2d at 995-997, 83 S. Ct. 1759 (1963). The FCC appears to consider the first two tests inapplicable to the case at bar, relying instead on the third test (FCC Br., at 33-34). The NARUC agrees that the only way FCC preemption can succeed in the instant proceeding is if there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area". Id., at 430, 10 L. Ed. 2d at 989. Yet the unprecedented action of the FCC in the instant case also calls into play the considerations set forth in test number two.

It seems quite obvious that the Supreme Court's third test--conflict between State and Federal regulation--is based upon a major presumption, i.e. that the Federal jurisdiction has been exercised and that there is adequate congressional authority for

the type of action through which the agency claims to have asserted such jurisdiction. There can be no conflict between State and Federal regulatory schemes if the Federal agency has not exercised its jurisdiction as in the case at bar. A mere policy statement to the effect that the States cannot regulate pay cable rates is not a set of regulations which can be considered as conflicting with State regulations within the meaning of the Court's ruling in Head.

The FCC's use of this "third test," "because it is obvious that, as a practical matter, state regulation of pay cable television rates cannot be permitted without impairing the FCC's superintendence of the field," (FCC Br., at 34) makes a major assumption with no basis in fact. The FCC assumes, and asks this Court to do the same, that the FCC has actually acted, and that it does in fact have congressionally mandated authority similar to that considered in test number two, to exlusively occupy the field of pay cable rates. These assumptions, however, are without merit.

Plaintiffs-appellees attempt to meet the requirements of the "conflict" test by citing Continental Air Lines, Inc. v. CAB, 522 F. 2d 107 (D.C. Cir., 1975) for the proposition that "official agency action can occur by means of policy statements in absence of regulations." (Br., at 23.) In principle the NARUC does not argue with the logic of this statement. However, the applicability of this concept to the case at bar is far from clear. Continental Air Lines dealt with the reviewability of agency action and not with a State challenge to Federal preemptive authority. The Court held that a CAB policy statement was final for the purposes of judicial review of that policy, stating, at 124:

> The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has yet put into effect.

Plaintiffs-appellees quoted the above language in their Brief, at 23, but failed to continue:

> Indeed, agency action may be reviewable even though it is never to have any formal legal effect. What is required is that the interests of the court and agency, in postponing review until the question arises in some more concrete and final form, be outweighed by the interest of those who seek relief from the challenged actions "immediate and practical impact" upon them. Id. at 124-125.

It is evident that the court in Continental Air Lines was not discussing the role of policy in preempting State legislation. The NARUC does not argue with the proposition that an agency can act through policy. However, the NARUC does contend that mere policy, unsubstantiated by a factual assessment and in the absence of actual regulation, is insufficient to preempt the State regulatory role.

Moreover, the NARUC strongly disagrees with plaintiffs-appellees' assertions that NARUC I, supra. stands for the proposition that the Federal government can preempt State rate regulation through mere policy statements. (Br., at 23-24.) In NARUC I, as discussed in our first argument herein, there was preemption, but only of entry and licensing of SMRS, not of rates. Furthermore, there was, contrary to plaintiffs-appellees' contentions, a specific Federal regulatory scheme. NARUC I was not a case where the FCC preempted State regulation and then failed to specify Federal regulations, as is the case at bar.

As the court stated in NARUC I, at 645:

> Our decision to uphold the Commission's classification of SMRS as non-common carriers leads directly to the affirmance of the Orders, insofar as they create a scheme of Federal regulation. In essence, the Commis-

> sion seeks to license SMRS on a first-come, first-served basis, out of a pool which includes, as well, all individual and system-sharing eligibles under 47 C.F.R. §§89, 91 and 93. While the Commission expects to pass upon the legal and techincal qualifications of the applicants, it does not plan to examine their financial qualifications. Most importantly, the Commission intends to leave SMRS free of all Federal regulation which would follow as a result of common carrier status. (Emphasis supplied.)

It is clear that in NARUC I the FCC was acting pursuant to specific statutory authority to license broadcasting services, i.e. 47 U.S.C. §301 (525 F. 2d at 645). In the case at bar the FCC has no such specific statutory authority to regulate rates for broadcasting services and therefore cannot preclude State regulation of pay cable rates without prescribing Federal regulations for which a definite need must be shown.

It is the NARUC's contention that the courts have never allowed a Federal agency to preclude State regulation while failing to prescribe a Federal regulatory scheme, in the absence of a specific congressional mandate to regulate the field.

In an attempt to discredit this theory, the FCC has relied upon Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1946) [FCC Br., at 31-32]. In Bethlehem, the Supreme Court ruled that the State of New York was precluded from permitting the unionization of Bethlemen's foremen despite Federal inaction in this area. However, the case turned upon the fact that the National Labor Relations Act, 49 Stat. 449, had specifically authorized the National Labor Relations Board to determine and certify appropriate bargaining units. Thus, regardless of Federal action or inaction, the States were precluded from certifying bargaining units. See also: Oregon-Washington Railroad & Navigation Co. v. Washington, 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1926) [where the in-

action of the Secretary of Agriculture was held not to allow State action since "the obligation to act without respect to the States is put directly on the Secretary..." Id. at 102-3], and Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958) [where the ICC had specific authority over local inter-terminal motor vehicle transportation of railroad passengers, thereby precluding regulation by the city].

In Bethlehem, the Supreme Court, in discussing the range of permissible State action in the face of Federal activity or lack thereof, stated, at 773-775:

> When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude state action if it is clear that Congress has intended no regulation except its own... In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised... But when Federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the Federal agency... However, when Federal administration has been slight under a statute which potentially allows minute and multitudinous regulation of its subject...or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the Federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation... The states are in those cases permitted to use their police power in the interval... However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute...
>
> It is clear that the failure of the National Labor Relations Board to extertain foremen's petitions was the latter class. (Emphasis supplied.)

The Supreme Court in Bethlehem was specifically ruling that Federal preemption of the State role, in conjunction with Federal inaction as to specific Federal regulations, was mandated by statute. The lesson to be learned from Bethlehem is clear, i.e. that a Federal agency must have congressional authority to preclude State action in a given field (e.g. rates, licensing, or certifying collective bargaining units) while that agency also refuses to specify Federal guidelines.

Considering that there is no specific statutory authority for FCC preemption of pay cable rate regulation, and that the judicial interpretation of FCC authority over CATV is fairly limited in scope (i.e.: "reasonably ancillary to broadcasting"), then any FCC preemption of State regulation of pay cable rates through mere policy statements and without specific Federal guidelines is an abuse of Federal power.

Furthermore, plaintiffs-appellees' attempt to characterize American Civil Liberties Union v. FCC, 523 F. 2d 1344 (9th Cir., 1975) [ACLU] as another case wherein the courts have held that the FCC can preclude State regulation of rates while refusing to provide Federal standards must also fail. The important distinction regarding ACLU is that that case did not even deal with the premption of the State regulatory role. ACLU dealt with the FCC's regulatory authority over access channels. In NARUC II (533 F. 2d 601), at fn. 112, at 620, J. Wilkey analyzed the impact of ACLU, stating:

> However, the opinion states its affirmance only of 'the rules above described,' 523 F. 2d 1351, and the description of the rules at the outset of the discussion of the merits, Id at 1348-49, contains no reference to that section. This coupled with the court's failure to discuss preemption at any time, leads us to conclude that there was no intention that the holding extend to that issue. (Emphasis supplied.)

It is therefore quite clear that the FCC here is attempting an action not previously allowed by any court. The FCC has attempted preemption in this area not for the purpose of regulating, but for the sole purpose of precluding lawful State involvement. Such an action by a Federal agency, where no conflict between Federal/State regulatory schemes exist, where no adequate need has been shown, and where no statutory authority exists, is surely invalid since it completely places valid State regulation at the whim of the Federal agency.

In conclusion the NARUC would emphasize the following: (1) any authority of the FCC over pay cable must be "reasonably ancillary" to its authority over broadcasting; (2) the FCC has no explicit authority over broadcast rates such as it has over common carrier rates; (3) plaintiffs-appellees have shown no cases in which a Federal agency has been allowed to preclude State regulation of an entire field (such as rates) in the absence of specific congressional authority or in the absence of specific need shown for an affirmative Federal regulatory program; and (4) for this court to hold that the FCC may preempt State regulation of pay cable rates, absent any authority over broadcast rates and for the sole purpose of precluding State regulation, would be to grant to all Federal agencies virtually limitless power to invade the constitutionally established province of State government.

CONCLUSION

For the reasons stated, we respectfully request that the decision of the U.S. District Court for the Northern District

of New York be reversed.

Respectfully submitted,

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December 30, 1977

CERTIFICATE OF SERVICE

I, William R. Nusbaum, Deputy Assistant General Counsel of the National Association of Regulatory Utility Commissioners, do hereby certify that I have this day served copies of the above and foregoing documents on the following by depositing same in the United States Mail, postage prepaid:

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